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NO. COA04-460

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA

v.

Harnett County
No. 02 CRS 57048

DAVID SCOTT ARNOLD

Appeal by defendant from judgment entered 12 June 2003 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 29 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Lorrin Freeman, for the State.

Charns & Charns, by D. Tucker Charns, for defendant-appellant.

STEELMAN, Judge.

On 10 March 2003, defendant, David Scott Arnold, was indicted for failing to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.9 (2003). The case was tried at the 9 June 2003 Session of Harnett County Criminal Superior Court. The evidence presented at trial tended to show the following: On 21 September 1993, defendant pled no contest to the charge of taking indecent liberties with a minor. Defendant was released from prison on 22 February 1996 and registered as a sex offender on 4 March 1996.

As of 4 March 2002, defendant was registered in Onslow County.

On 29 October 2002, defendant's daughter was enrolled at Angier Elementary School in Harnett County. The enrollment form listed defendant as her father and indicated a Harnett County address. On 5 November 2002, Detective Sabrina Currin of the Harnett County Sheriff's Department received an anonymous call stating that defendant was living in Harnett County. On 8 November 2002, Detective Currin contacted the Onslow County Sheriff's Department to verify if defendant was living in Onslow County. Detective Raeford Padgett went to defendant's last registered address, but found nobody at home. Detective Padgett left a note asking defendant to contact him, but received no response. Defendant was arrested in Harnett County on 18 November 2002. Upon his arrest, defendant indicated he lived in Angier, North Carolina, which is in Harnett County. Following his arrest, defendant registered in Harnett County.

The jury found defendant guilty of failure to register as a sex offender. The trial court sentenced defendant to an active sentence within the presumptive range of twenty-seven to thirty-three months imprisonment. Defendant appeals.

In defendant's first assignment of error, he contends the trial court erred by allowing into evidence prior charges against him for failing to register as a sex offender. We disagree.

Defendant was convicted in 1999 for failure to register as a sex offender, and a second charge was dismissed after defendant properly registered. Defendant contends these charges were not related to his present offense, were not proper court documents,

and should not have been admitted because he did not testify and was thus not subject to impeachment. We disagree.

Defendant relies on the case of *State v. Wilkerson* in support of his contention that the trial court erred. 356 N.C. 418, 571 S.E.2d 583 (2002) (reversing this Court's decision and adopting Judge Wynn's dissent in *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5 (2002)). In *Wilkerson*, our Supreme Court held the bare fact of a defendant's prior convictions is not admissible under Rule 404(b) of the Rules of Evidence without some proffer of evidence concerning the facts and circumstances underlying the prior convictions. *Id.* Defendant's reliance on *Wilkerson* is misplaced. In *Wilkerson*, it was the deputy clerk who testified regarding the bare facts of defendant's prior convictions and who was unable to offer testimony about the facts underlying those convictions. However, in this case, it was the arresting officer who testified regarding defendant's prior arrests and conviction for failure to register and provided the court with the facts and circumstances underlying both arrests.

Rule 404(b) of the North Carolina Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2004). Our Court has stated:

This rule is 'a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant,

subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.'

State v. Washington, 141 N.C. App. 354, 366, 540 S.E.2d 388, 397 (2000) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Here, the evidence of defendant's prior conviction and prior charge for failing to register as a sex offender was relevant to show the defendant's knowledge and absence of mistake. Specifically, the evidence tended to show defendant knew of the law requiring that he register every time he relocated, knew how to properly register, and thus the absence of mistake. The trial judge gave the limiting instruction to the jury contained in instruction 104.15 of the North Carolina Pattern Jury Instructions. The judge instructed the jury "this evidence was received solely for the purpose of showing that the defendant had knowledge. . . . and also to show the absence of mistake on his part. So if you believe this evidence, you may consider it but only for the limited purpose for which it was received." The trial court did not abuse its discretion by admitting this evidence.

We decline to review defendant's argument that the computer "print-outs" should not have been admitted because they were not proper court documents and not certified. As we stated above, the officer who arrested defendant on both of the previous occasions when defendant failed to register, testified regarding both of defendant's prior arrests. At no time during the questioning of

Detective Currin did defendant object to this line of questioning or the introduction of the printouts into evidence. In order to preserve a question for appellate review, Rule 10(b)(1) of the Rules of Appellate Procedure requires that a complaining party object at trial, stating the specific grounds for the ruling that party desires. Failure to raise such objection at trial limits our review to plain error. *State v. Turner*, 98 N.C. App. 442, 447, 391 S.E.2d 524, 527 (1990); N.C. R. App. P. 10(c)(4). However, the plain error rule does not render the requirement of N.C.R. App. P. 10(a), limiting the scope of review to those assignments of error set out in the record on appeal, inapplicable. *State v. Lovett*, 119 N.C. App. 689, 693-94, 460 S.E.2d 177, 181 (1995). Where a defendant fails to assert plain error in an assignment of error in the record on appeal, this Court will not conduct plain error review. *Id.* at 694, 460 S.E.2d at 181. Our review of the record indicates defendant did not allege plain error in his assignment of error as to this issue. Defendant further contends the admission of these printouts violated his rights under the United States Constitution and the constitution of the State of North Carolina. Constitutional issues not raised in the trial court will not be reviewed on appeal. *State v. Cooke*, 306 N.C. 132, 137, 291 S.E.2d 618, 621 (1982).

In defendant's third assignment of error he contends the trial court erred by allowing the State to introduce school records of his daughter under the exception for business records. Defendant did not object at trial to the admission of the school

records. See N.C. R. App. P. 10(b)(1). Thus, our review is limited to plain error. *Lovett*, 119 N.C. App. at 693-94, 460 S.E.2d at 181. Defendant also failed to assert plain error in an assignment of error in the record on appeal, therefore we will not consider it now. *Id.* at 694, 460 S.E.2d at 181. What defendant does assert in his assignment of error is that the admission of the school record violated his state and federal constitutional rights. As stated above, constitutional issues not raised in the trial court will not be reviewed on appeal. *Cooke*, 306 N.C. at 137, 291 S.E.2d at 621.

Even assuming *arguendo* that the court erred in admitting the school record, in light of the overwhelming evidence against defendant, the admission would not rise to the level of prejudicial error requiring a new trial. This assignment of error is without merit.

In defendant's fifth assignment of error he contends the trial court erred in denying his motion to dismiss at the close of the State's evidence. Defendant asserts that the State failed to present any competent evidence demonstrating he failed to register as a sex offender within the time limits prescribed by statute. We disagree.

After careful review of the record, briefs and contentions of the parties, we find no error. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "Substantial evidence is relevant

evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (citations omitted). The evidence must be viewed in the light most favorable to the State. *Id.*

In order to convict defendant of failure to register as a sex offender, the State must prove: "1) the defendant is a sex offender who is required to register; and 2) that defendant failed to notify the last registering sheriff of a change of address" within ten days following the change of address. *State v. Harrison*, ___ N.C. App. ___, ___, 598 S.E.2d 261, 262 (2004); N.C. Gen. Stat. § 14-208.9 (a) (2004). In the instant case, defendant was required to register because he was a resident of North Carolina and had a "reportable conviction" for taking indecent liberties with a minor. See N.C. Gen. Stat. § 14-208.6(4) (2004). The evidence tended to show that Detective Currin received an anonymous call that defendant was living in Harnett County on 5 November 2002. Defendant was living in Harnett County. On 8 November 2002, when Detective Raeford Padgett went to defendant's last registered address in Onslow County to verify if defendant still lived there, he found no one at home and received no response to a note left on the door. Police subsequently arrested defendant in Harnett County on 18 November 2002. Following his arrest, defendant registered in Harnett County. After viewing this evidence in the light most favorable to the State, we find this evidence permits a reasonable inference that defendant failed to properly register as required by statute when he moved to Harnett County. Accordingly, the

assignment of error is without merit.

In defendant's sixth assignment of error he contends the trial court erred by using an underlying conviction of indecent liberties, which triggered the requirement that he register as a sex offender, to calculate his prior record level. We find the case of *State v. Harrison*, ___ N.C. App. ___, 598 S.E.2d 261 (2004) controlling. In *Harrison*, the defendant argued that his conviction for second-degree rape was an element of the offense of failing to register as a sex offender, thus precluding the trial court from using the conviction in determining his record level during sentencing. *Id.* at ___, 598 S.E.2d at 262. This Court rejected the defendant's argument and held he was not subjected to double jeopardy by including his conviction of second-degree rape in calculating his prior record level. *Id.* We find *Harrison* to be indistinguishable from the instant case. Accordingly, we find no error.

Defendant failed to argue his remaining assignments of error in his brief; they are therefore deemed abandoned. N.C. R. App. P. 28(b)(6).

NO ERROR.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).